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LIABILITY OF FRATERNAL ORDER FOR INJURIES INFLICTED IN RITUALISTIC CEREMONY.

It was held by Supreme Court of Alabama that, where death resulted to an applicant for membership in a fraternal order from the wrongful use of electrical appliances in a ceremony of initiation being performed by the members of a subordinate lodge, this made the order liable on the principle of agency. Loyal Order of Moose v. Kenny, 73 So. 518.

The opinion recites the fact that the charter authorizes the order to "organize subordinate lodges having ritualistic ceremonies," that such lodges are necessary for the success of the order, that it was only by participating in such ceremonies that members became eligible in the formation of subordinate lodges, and without members the lodges could not be formed nor continue their existence. The evidence showed, also, that an officer appointed by the supreme lodge of the order to look after ritualistic work carried on in subordinate lodges, specifically approved of the "electrical stunts" that were being used, and from their negligent use the death complained of resulted. It is to be said the suit was against the Supreme Order, a local subordinate lodge and the members taking part in the ceremonial, but the court allowed the case to go to the jury only as to the Supreme Order, against which a verdict was rendered and affirmed by the Supreme Court.

Do the facts show liability, conceding actionable negligence, of the order or of the subordinate lodge or of the individuals or of all of the defendants?

Reliance is placed for the conclusion by the Alabama court, so far as liability of the order is concerned, on Mitchell v. Leech, 69 S. C. 413, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811. This case announces the principle of agency of subordinate lodges, even to the extent of malfeasance in the performance of their duties. But neither that case nor the instant case discusses the effect of a voluntary submission by an applicant for membership into an order, though it must be admitted that until he actually becomes a member neither the order nor any of its lodges can have any control over him except by his voluntary consent.

It may be urged, however, that the submission is not wholly voluntary but upon condition of applicant obtaining membership and such obtaining is both for the benefit of the order and of the applicant. This *nexus* to sustain relationship of principal and agent seems greatly attenuated.

There seems, however, to be many reasons why a fraternal order should not be deemed to be a principal and subordinate lodges, nor their members, its agents in any such case as stated. Initiation into an order of this kind is but a preliminary step in the work it is chartered to carry on. That it is authorized to organize lodges "having ritualistic ceremonies" does nothing more, if this much, than define eligibility to membership in the order. It is greatly like saying that it must be composed of males or females, or of residents of a certain locality. Or it might require that applicants should be graduates of some kind of a school.

Is the case different where the order requires that its own subordinate lodges shall, in effect, certify that an applicant has gone through with a ceremony, secret or otherwise, prescribed by itself? To acquire this is to do nothing more than to procure satisfactory evidence to the order of eligibility.

It is to be remembered, that the order does not impose submission to these ceremonies on anyone. It is an applicant's free choice, even request, to submit to them.

The request is made and the initiation taken in advance of any connection with the order. To apply for initiation is preliminary to the order doing anything in strict furtherance of its chartered objects. Initiation, therefore, is not only *ultra vires* those objects, but known so to be at the time it is taken.

Let us suppose that eligibility to an order is predicated upon age or residence, or upon an applicant's reputation for morality. The fact that the order might make inquiry in its own way might make a mere busy body become liable to an applicant for slander or libel, while previous consent to make the inquiry would bring the matter under the rule of a privileged communication.

There seems, however, even a stronger reason than this for non-liability of the order. The applicant either invites rough treatment in the pursuit of his own ends or he does not. If he does, the fact that this tends to the advantage of the order can make no difference. His request stands as the sole reason for his being put in the situation he occupies. He assumes the risk of the rough treatment he receives—in other words, he is guilty of contributory negligence. He may be like one who invites a fight and sues for injuries received therein.

But suppose that under misrepresentation he incurs a greater risk than he was led to believe he would be subjected to. Then the inquiry would be, who misled him and was what he is subjected to reasonably to be apprehended from what the order prescribes in initiation?

While it may be true, that an agent in carrying out the directions of his principal may be liable for the latter transcending his authority, yet this rule has its limitations. It has a limitation as to the doing of that about which there can be no reasonable presumption of authority. Thus in the instant case there could be no presumption of authority to cause death by the use of appliances which might bring about death, or to use them in a way, that such a result might ensue. If the applicant accepts the use of such appliances in a ceremony, he assumes the risk of harmful possibility, just as he assumes the risk of rough treatment.

Under these circumstances, however, it might be thought that, if there was negligent or willful conduct, there ought to be liability somewhere. If the applicant were suddenly placed in surroundings such as to obscure his judgment so as to call for exercise of judgment in an emergency, those placing him there ought to be liable, though by his request he was so placed. This may be granted, but hardly, we think, would this principle go any further than to make individual actors liable to the applicant. It is to be remembered that up to this point he submits to individuals, designated it is true by the corporation, but not so far as the transaction of any corporate business is concerned.

NOTES OF IMPORTANT DECISIONS.

COMMERCE—GATEMAN KILLED BY INTRASTATE TRAIN AS FEDERAL EMPLOYE.—In Southern Pacific Co. v. Industrial Acc. Com., 161 Pac. 1139, decided by California Supreme Court, it was held that an award by a state industrial accident commission in favor of widow of a gateman killed by an intrastate train where it crossed a public street was without jurisdiction, as the case came under Federal Employers' Liability Act.

The railroad by whom deceased was employed was engaged both in interstate and intrastate commerce, and it was the duty of deceased to close the gates on the approach of any train. As a local train approached, he attempted to do this, first closing one gate, and in attempting to close another he found a horse and wagon in the way. He started across the track to remove these and was killed.

The court referred to the well-known case of Pedersen v. Del., etc., R. Co., 229 U. S. 146, where deceased was killed while carrying bolts to a bridge necessary to be kept up as part of the interstate road.

The court said the duty was similar to that of a track walker, his duties being to keep an

instrumentality of interstate commerce in suitable condition. The court admits the question is a very narrow one.

It seems to us a dissent by one judge is better founded, because the duty in which he, the gateman, was engaged was to safeguard the lives of the public using the streets, and this he was attempting to do as against a local train.

The dissent says: "It is true under the decisions of the United States Supreme Court, that men employed in the repair of bridges, tunnels and the like which were such instrumentalities by carriers of both interstate and intrastate commerce are engaged in interstate commerce. * * * But the watchman's work here at the time of the collision may or may not have affected the interstate commerce of the petitioner." This was thought to put the burden on the carrier to show it was if being sued in a state court under a state statute.

This watchman had to perform casual acts as necessity arose, and it seems to us the distinction that is drawn is sound.

CONSTITUTIONAL LAW — ORDINANCE CONDITIONING RIGHT TO ERECTION OF BILL BOARDS UPON CONSENT OF MAJORITY OF PROPERTY OWNERS.—In Cusack Company v. Chicago, 37 Supreme Ct. 190, U. S. Supreme Court sustains the constitutionality of an ordinance conditioning the right to erect bill boards on a street to obtaining consent of majority of the frontage on both sides of a street in a block.

The court speaks of the contention that such a provision impairs the validity of the ordinance as "palpably frivolous." The court, after stating that a general prohibition of bill boards in the residence portion of a city is in "the interest of the safety, morality, health and decency of the community," says the provision in question may benefit and cannot injure one wishing privilege to erect a bill board, and "such a reference to a neighborhood of the propriety of having carried on within it trades or occupations which are properly subject to regulation in the exercise of the police power is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons."

Our training under common law principles has taught that intoxicating liquor could by law be declared an outlaw, but we have not thought this principle could be invoked as justification for the large exercise of police power sustained in this country. The regulation of liquor stands apart from all these things, the same as, for example, do bawdy houses. The ruling as to bill boards involves, or may involve, ethical considerations. It is hard to discern where morality, safety or decency may be in question, or, if so, regulation could not adequately guard these in every way without absolute denial of one's right to use his property in a wholly harmless way.

RECENT DECISIONS IN THE BRITISH COURTS.

Liability of Vessel Carrying Contraband.—Writers on international law affirm that originally the contraband nature of goods affected the ship in which they were carried, and both were liable on capture to forfeiture and condemnation. But the practice was relaxed and the rule introduced that if the owners of the ship were not the owners of the contraband, and were not privy to the carriage of contraband, the ship went free, though the neutral owner forfeited his freight. Wharton's International Law, 5th Ed., p. 751. Such, however, was not the Continental rule, and in the Declaration of London, Article 40, a compromise was arrived at, and it was declared that "a vessel carrying contraband may be condemned if the contraband reckoned either by value, weight, volume or freight forms more than half cargo." Sometime ago in the Prize Court that rule and not the English rule was applied in the case of the Hakam, which, however, was an instance of direct voyage, and now in the case of the Maracaibo, 61 S. J. 87, it has been held that the principle is not confined to cases where the voyage is direct to an enemy port, but also applies to cases of continuous transport where the initial voyage is to a neutral port.

Effect of War on Rights of Parents to Custody of Children.—A petition lately heard by the appeal court was of more than usual interest, in that it involved the consideration of the effect of the war on personal relations in their legal aspects. It was an application by the husband, the petitioner in a divorce suit, as to the custody of two infant children of the marriage, who were born in England. The petitioner was a German subject formerly resident in England,

where he carried on business. He had been repatriated. He had been married to a lady of Dutch extraction, and had obtained a decree for divorce against her. The children were a girl aged 17 and a boy aged 14. Shearman, J., on October 13, made an order that the two children should be sent to their father in Germany, subject to an undertaking by the petitioner that the boy should be sent to a school at or near Geneva, and that the girl would live near him. The boy was in delicate health. Both parents were people of means. The respondent wife, who had married the co-respondent, commenced proceedings in the Chancery Division to make the children wards of court. She appealed from the decision of Shearman, J. The appeal was allowed on the ground that the children were British subjects, having been born in this country, and considerations of public policy would prevent the court from sending British subjects to the country of an alien enemy. They sent the case back to Shearman, J., to consider what order ought to be made for their custody, maintenance, and education, it being understood that in no case must they be sent to Germany.

Are Funds Deposited to Secure Payment of Insurance Claims Available to Pay Costs in Liquidation?—In consequence of the failure of several large insurance companies in 1868, an act was passed in 1870 providing that companies doing life business should, as a condition of commencing operations at all, deposit in court as a life insurance fund the sum of £20,000, to be retained till the company had accumulated out of its premium income a life fund of £40,000. In re National Standard Life Assurance Co., Ld., 142 L. T. I. 57, the question arose on a summons taken out by the liquidator of the company whether securities in the hands of the Paymaster-General representing the sum of £20,000 deposited on registration pursuant to the Life Assurance Companies Act of 1870 formed a fund available for the general costs of winding up and for money payable into court for security for costs in a pending action, or whether it was available only for policyholders' claims. It was held that the legislature did not intend to put the policyholders in a position similar to that of debenture holders having a first charge upon specific assets, and that the deposit was available for the costs of the winding up of the life assurance business and the moneys payable into court in the pending actions.

The Doctrine of Contributory Negligence as Applied to Children.—"The controversy with regard to the contributory negligence of children has now been settled on the footing that a child of two and a half years is incapable of negligence." Per Lord Salvesen in Hardie v. Sneddon, Infra. But it must not be thought that such a conclusion implies that a defendant in a case concerning such a child, is defenseless. The result rather is to shift the negligence from the child to the parent, as may be illustrated from Lord Kinnear's opinion in Johnstone v. Magistrates of Lochgelly, 1913 S. C. 1078, where he said, "The injured child was put in danger because the mother believed that children of very tender age who were told to go from one house to another might be trusted not to stray. If it was incumbent on any one to be watchful so as to prevent their straying, I see no ground for holding that that duty was imposed on the defendants." In Hardie v. Sneddon, 1916 S. L. T. 197, an action in respect of the death of a child of two years and five months, who was drowned through falling into an unfenced well, the above principle was applied and the case dismissed as irrelevant, the court finding in effect that it was plaintiff's duty as a parent to take care that his young children should not be left unattended in the neighborhood of the well.

The following further remarks of Low Salvesen in the same case should be noted as they indicate the possibility of cases happening where the duty with regard to very young children would rest on the defendant practically absolutely, his Lordship said, "I quite see that in the exceptional class of case where a dangerous machine has been placed upon a property, or where there has been a concealed danger, it may make a material difference whether the person injured is an adult of full intelligence, or a child, or an adult of less intelligence than ordinary, because a danger that may not be appreciated by the latter may be obvious to those of higher intelligence, and therefore where a child might unknowingly have gone into a danger, an adult of mature intelligence would not be excused from incurring the same danger owing to his greater knowledge and experience." Reading these words one feels that the attempted distinction is unreal; or, at least, that it was out of place so far as Hardie v. Sneddon was concerned, for what more hidden danger or trap could there be to a very young child than a well? The doctrine of the older cases would seem to place on the property owner the duty of fencing, and in our opinion there is much to be said for the general policy of these decisions.

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ENFORCEMENT IN EQUITY OF ADOPTION CONTRACTS AND THOSE IN THE NATURE OF ADOPTION CONTRACTS.

Preliminary—It is sometimes a matter of construction, whether an agreement, whereby a parent surrenders a child to the care and keeping of another other than by a statutory adoption, is merely a substitution for such adoption or there is given mere right of inheritance to a child. Thus in a well known case decided by Missouri Supreme Court,[1] there was an agreement whereby a husband and wife took a child of four years of age from her widowed mother upon promise "that they would provide and care well for her and adopt her as their child and leave her the property at their death." The child went into their keeping and was held out to the world as an adopted child until the husband died and afterwards by the widow, who had also deceased. The husband died testate, leaving his property to his wife, who died intestate. Her estate was claimed by the brothers and sisters of the wife. It was said: "The question then is whether this is a valid agreement executed upon a sufficient consideration, and whether, being wholly performed by plaintiff, she is not entitled, upon the death of said James and Catherine McLaughlin, without performance on their part, to a specific performance of the contract and to hold and enjoy the property so contracted for, at their death, *as against these defendants, who are the brothers and sisters of the said Catherine, deceased?*[2] It was further said: "If such a contract may lawfully be made by the parties, then the parties defendant to this suit stand in the relation of heirs at law, if anything, to the estate of the decedent, while the plaintiff, having performed the services and yielded the obedience required of her by the contract, and having fulfilled the same, has the paramount claim of a creditor, an equitable owner of the property contracted to be given her in consideration of her said services." This general language may be thought applicable only to the case in hand and not necessarily decisive had James and Catherine or either of them left other children, or had there been any attempted disposition by the latter of the property by will, or had Catherine, after the death of James, conveyed the property or incumbered it. The contract was held valid and enforceable against the defendants, and the above observations indicate the scope of treatment hereinafter pursued.

It is to be observed here, however, that a recent case in the court which decided the Sharkey case refers to that case, where an agreement to adopt one as a child, gave her a status as against the husband of the adoptor. But the contract there was taken as trying to do no more than to create inheritable right.[3] It may be said of this case generally, that it well presents the great consensus of opinion that an oral agreement to adopt is not within the statute of frauds where there is performance and that a wife entering into such a contract of adoption may ratify same after she becomes discovert. The case also is in line with authority generally in declaring, that a statute for adoption does not prevent a husband and wife or either of them adopting a child in any other lawful manner.

Contract to Give One Rights of Inheritance—The last point instanced as having been decided by the Lindsley case was not seriously discussed in the opinion, but merely stated as being obvious. It has, however, been stoutly contested in other cases. Thus in an Iowa case,[4] which was a suit in equity to enforce specific performance of a contract to adopt, it was said: "It is contended by appellant that the statutes re-

(1) Sharkey v. McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270.
(2) Italics supplied.
(3) Lindsley v. Patterson, Mo., 177 S. W. 826, L. R. A. 1915 F, 680.
(4) Chehak v. Battles, 133 Iowa 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130.

lating to adoption are exclusive and that no right to take property by an adopted child may be created in any other way. There is some basis for this contention in at least two of the decisions of this court."

One of these cases[5] said: "Our statute makes full and explicit provisions as to the descent of property and describes the persons who may take by descent. * * * In our opinion, rights of inheritance cannot be conferred by parol agreement." And: "Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner and can be acquired in no other way." The Chehak case conceded the truth of the contention, but held that rights in property could be based on a contract where there was full performance by the obligee.

In a New York case,[6] the same contention was made and it was held that an agreement to adopt could not be regarded as invalid upon any principle of public policy if entered into by an intestate without children, though it might result in partial exclusion of their own children from their estate. The fact that no action at law might not be brought on it did not bar its being enforced in equity.

In a Missouri case[7] specific performance is based upon consideration. It was said: "The surrender by the mother of all control of the child and the services and companionship of the latter, constituted valuable considerations for the promise of Brewster and his wife that she should have and inherit from the estate of said parties * * * in the same manner and to the same extent that a child born of their union would inherit." By this it is perceived that such a reference does not do more that limit the relief under such a contract or measure its possibilities. It does not affect its nature.

But later it was held by this court[8] that an oral contract to adopt one as a child does not prevent her being cut out by the will of the adopter. It was said: "A contract to adopt a child is one thing and a contract to make a will in the child's favor is another. If a child is adopted it is entitled to inherit as an heir, if the adopting parent should die intestate, but it is liable to be cut out by will as one's own child is," but no authority is cited to this statement. Summarizing these cases it is to be said that the principle of inheritance status not being conferable by contract has little or any value in a practical way. If an agreement and performance is considered, the contract will be enforced regardless of any such principle.

Right to Deprive Child not Adopted According to Law of Rights Acquired by Contract—In a Minnesota case[9] there was an oral contract to adopt an infant, she to be "their child and that their property would go to her on their death," the adoption being by a husband and wife then childless. The wife died and the husband remarrying, also died, leaving all of his property by will to his second wife. After the court observed that, if plaintiff had no more than the rights of a natural child she would have no right to recover, the opinion went on to say: "But if the contract with the Withems expressly provided not only that plaintiff should be adopted by them but also that she should receive their property or a child's share thereof, at their death, a different question is presented. Under such a contract the rights of plaintiff would not depend upon the will, nor upon the laws of descent, but would be fixed and determined by the contract. Such rights attach to the property of the decedent by virtue of the

(5) Shearer v. Weaver, 56 Iowa 578, 9 N. W. 907.

(6) Winne v. Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647.

(7) Healey v. Simpson, 113 Mo. 340.

(8) Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895.

(9) Odenbreit v. Utheim, 131 Minn. 56, 154 N. W. 741, L. R. A. 1916 D, 421.

express contract made by him in his lifetime, and create, or at least, may create, a claim of title to the property adverse to the title thereto given by will or by the laws of decedent." But the contract was construed to mean no more than to give plaintiff the right of a natural child or one adopted in a statutory way.

Nor was there any contractual rights in a child taken from an orphan asylum where the agreement was to take children to the home of parties, take good care of them and rear and educate them in a suitable and proper manner and treat them in all respects as their own children," so as to prevent property being willed away from them.[10] This case, however, was not even looked at as showing a contract of adoption. It was said: "It seems to have been just the ordinary case of a person taking a child from an orphan asylum to rear and educate it for whatever services it might render and for its companionship."

Very different were the facts in a Kansas case.[11] In this case there was a written contract whereby parents of a child of eight years gave her into the keeping of a husband and wife, who were childless, they to take her into their family, treat her as their own child, as if born to them, receive her obedience during her minority and to take at their death all of the property of which they should die seized and possessed. This contract was made in Sweden and the child sent to America and her name changed from Cecelia Anderson to Hilda Palmlund, the adopting parents being Palmlund. She lived with the latter, whom she called father and mother, until she was 21 years old and then married with their consent. Her adopted father died testate leaving all of his property to his wife, who died intestate. The adopted child sued for specific performance claiming the entire property, there being collateral kindred. The court appeared argumentatively to treat this case as if the will of the husband, who predeceased the wife was to be considered. It cited authority to the effect that there is no rule of public policy forbidding the making of an agreement to dispose of property in a particular manner by will,[12] and that courts of equity will enforce agreements of this nature,[13] and held that: "The rights of plaintiff depend in no respect upon any contract of adoption nor upon any claim of inheritance through adoption, but wholly upon contract."

While in an Iowa case,[14] the principle that a contract may be made with a child or with others for its benefit, that would prevent disposition by a will, it was said as to the agreement before the court that it "was, not that the plaintiff should inherit, but should have the property the same as though he were their own son. This did not prevent its disposition by will, nor undertake to confer on him the right of inheritance, but measured the interest he was to have by likening it to that which a son would inherit." This case is very unsatisfactory, as the adopted child appears to have prevailed and what is above said was merely a voluntary statement.

But a later Iowa case[15] recognizes the principle that, if there was an agreement to leave to one a definite share in an estate it would be enforced, but the agreement in this case did not elevate plaintiff's claim above that of an adopted child by such testimony as was necessary to establish it in a satisfactory way.

In a New Jersey case[16] there was a case of adoption and a will in favor of the

(10) Baumann v. Kusian, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756.

(11) Anderson v. Anderson, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229.

(12) Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345.

(13) Bolman v. Overall, 80 Ala. 451, 2 So. 624, 60 Am. Rep. 107.

(14) Stiles v. Breed, 151 Iowa 86, 130 N. W. 376.

(15) Finger v. Auken, 154 Iowa 507, 131 N. W. 657.

(16) Van Tine v. Van Tine, N. J. Eq., 15 Atl. 249, 1 L. R. A. 155.

adopter, but much stress was laid upon the personal property, the testatrix then owning no real estate. The child brought a bill for specific performance. There was a suit for partition by the heirs of decedent and it was ruled that the complainant and all the defendants in the cross-bill be required to join in the execution of a deed conveying all their right, title and interest in the land to the adopted child.

It is true this case was decided rather on evidence of the expressed intent of the adopter, but much stress was laid upon the performance by the child of all her duties as a child. As casting some doubt on the right of the adoptive parent to have disposed of this real estate by will to others than the child, the opinion said: "It is true that she purchased the real estate in 1886, but there is not the slightest evidence to show that she did it for the purpose of preventing Jessie from getting that much of her estate or of altering her will to that extent."

In a California case,[17] the principle of specific performance is very broadly recognized even to an agreement to make a will in one's favor, but it was said, as stated *supra*, that this was not even a contract of adoption and there was no specific promise to make a will in favor of the plaintiff.

In an Illinois case a defective adoption, because of the wife not joining therein, was held to be an enforceable contract in its promising to make plaintiff the promisor's sole and only heir.[18]

And so where an agreement to adopt a child and leave her a child's share in adopter's estate, the agreement never having been recorded as the statute required.[19] The court treated this as a promise to make a will. It was said that though the contract was invalid as a contract of adoption, it was good and sufficient as a contract to leave plaintiff a child's share in the estate of deceased at his death.

In this case many cases are referred to of agreements not of adoption. Thus there was quoted with approval the following: "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual or for a particular purpose, as well by will as by conveyance to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune and the sole and best judge as to the manner and time of disposing of it."[20]

A very instructive case along this line is by Nebraska Supreme Court,[21] in which there was an agreement to leave a child all of the property of which her uncle, the adopter, should be possessed. The evidence showed sufficient definiteness for enforcement, where the uncle died intestate leaving other heirs as closely related as was the child, and there was proof that the child had partly or wholly performed her contract so as to take it out of the statute of frauds, as also to be a fraud if specific performance were not decreed.

Agreement to Make Wills to Children Not Adopted—The principal question about such contracts as I have been considering is their definiteness. As we have seen in regard to contracts, in the nature of adoption contracts, there does not appear so far as investigation reveals any enforcement

(17) Bauman v. Kusian, supra.
(18) Jones v. Bean, 136 Ill. App. 545.
(19) Burns v. Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.
(20) Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773.
(21) Kofka v. Rosieky, 41 Neb. 328, 59 N. W. 708, 43 Am. St. Rep. 685, 25 L. R. A. 207.

as against others claiming under wills or as excluding other children. All of the cases have referred to other cases of the adopting parent dying intestate or of partial intestacy, as seen in Van Tine v. Van Tine, *supra.* But there have been cases where children have gone into families upon the promise of wills in their favor, and where the contracts have been shown to be definite and supported by cogent evidence and relief has been awarded.

Thus is a Minnesota case,[22] that upon the death of plaintiff's father, she being about 8 years of age, it was agreed between her and her sisters to live with their uncle and aunt and give them their services until they grew up in consideration that they were to receive all of the latter's property at the time of their death, this agreement having been oral. The uncle died testate, devising his property to others. Each of her sisters brought a similar suit. Demurrer to the complaint was overruled. The opinion cites many cases where relief was extended as in adoption contracts.

A Utah case[23] shows a contract between a 16 year old girl and an old woman in apparent good health, whereby the former was to be left all of the property of the latter at her death in consideration of the girl's promise to take care of her as long as she lived. It was held to be enforceable specifically, where the obligee performed her part.

In Missouri[24] a case shows the taking by an aunt of her brother's child upon the understanding that the child was to come and live with her, be as a daughter to her and take care of her for the rest of her life and at her death all of her property was to go to the child. The child performed the agreement made for her and the aunt dying without providing for her by will she was awarded specific performance of her agreement.

(22) Svanburg v. Fosseen, 75 Minn. 490, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. Rep. 490.
(23) Brinton v. Van Cott, 8 Utah 480.
(24) Sutton v. Hayden, 62 Mo. 101.

But the agreement must be definite or it will not be enforced.[25] And if the child fails to perform her or his part of the agreement, the court will not award specific performance.[26]

Test of Performance by Child—While this last cited case was decided against the plaintiff seeking specific performance, a good general rule as to specific performance and its requirement by children taken into one's family is given in a distinguishing way. Thus it was said: "Specific performance of a contract will not be enforceable, where the consideration is labor and services which may be estimated and the value liquidated in money; but where the consideration is that the promissee shall assume a peculiar and distinct relation to the promissor, and the services are of such a character that it is practically impossible to estimate their value by any money standard, specific performance will be decreed."

As shown by a well known Missouri case,[27] the court will not inquire over closely into performance by the child where she comes into a relation of the sort above described. Thus it was said as to an attempt to show advantages by the child in being cared for by the adopting parent under an oral contract that: "It is argued that her relatives were poor and that she has had in the family of Mr. Lynn a better home and a more refined rearing than she would have had if he had not taken her. That may be; but it does not follow as a legal conclusion that the reward was all on her side, or even that it was her gain at all. That she took the place of an only daughter in the lives of Mr. and Mrs. Lynn and performed her part as such is the cold fact which the law regards as sufficient consideration to support the contract. How much she added

(25) Wall's Appeal, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 288.
(26) Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025.
(27) Lynn v. Hockaday, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480.

to their happiness the law does not undertake to estimate. What her life would have been if it had been left to flow on in the channel that nature had given her, whether happier and better or the contrary, no one can tell. But the evidence shows that by no will of hers, and not primarily for her pleasure, she was taken away from her own relatives and was as completely deprived of the affection that comes from natural family ties as if nature had provided her with none."

The law, when we invoke it as supplying a rule for a status like this will be chary of laying down a hard and fast rule. It will presume that parties to such contracts consider well the helplessness of the obligee, who cannot contract for herself. If there is disappointment in lack of obedience or in failure of the child to show proper affection, it will be assumed rather that those who are to mould its life have failed in some way in their duty. Therefore, while it may be a rule of law, that the child shall perform its part, so as to be entitled to demand performance by the other parties, practically a child taken into custody of others as one adopted, quite universally will be accorded the rights of a regularly adopted child—at least we find no case where for any such reason its claims have been disallowed.

Intent in Contracts for Adoption Governed by Effect of Statutory Adoption—While as seen specific performance may be sought in a court of equity of contract for adoption, yet it has been held that, if statutory adoption will not be recognized in another state as giving an interest in land there situated, neither will a contract to adopt.

Thus in a Federal Circuit Court in Alabama,[28] in a case where there was a defective attempt at adoption under Louisiana law, there was claim by the adoptee to land in Alabama, which state's statute of descents excluded adopted children. It was ruled he could not take. It was said: "The only theory on which plaintiff's can prevail is that there was an agreement independent of the adoption to leave to the plaintiff shares in intestate's property. The moment plaintiff's rights in the Alabama property are attempted to be worked out through the agreement to adopt * * * we are confronted with the proposition that parties must intend to confer only such rights as Louisiana law availed to confer."

But the question might recur, whether, if a contract valid to confer rights in real estate elsewhere, can deny to an adoption contract what an adoptee acquires by performance of its conditions. While adopted children as such may be excluded, why should they not be deemed as standing in the nature of purchasers upon consideration paid or agreed to be paid?

The reference made by the court to an Alabama case is where an adopted child of another state was denied any right in Alabama realty,[29] but the opinion refers entirely to legitimated children, between whom and adopted children there would seem to be a wide difference. State policy might be against legitimizing bastards and not against adoption of children, and even if against the latter this might not exclude enforecement of contracts for adoption and heirship, in the same way as any contract might be given recognition including contract for future disposal of property. As to this fraud in non-performance legitimately could be inferred. The Hood case, however, whatever else it decided, held that nowhere would the defective adoption carry more than had it have been perfected. And this ruling is perhaps applicable to such contracts generally.

N. C. COLLIER.

St. Louis, Mo.

(28) Hood v. McGehee, 189 Fed. 205, affd. 199 Fed. 989, 117 C. C. A. 664.

(29) Brown v. Finley, 157 Ala. 424, 47 So. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68.

LANDLORD AND TENANT—RELEASE OF LESSEE.

STANDARD BREWING CO. v. WEIL.

Court of Appeals of Maryland. Dec. 13, 1916.

99 Atl. 661.

A lessee is not released from liability under a lease for a saloon and restaurant, because of a subsequent order of the liquor license commissioners prohibiting further use of the premises for a saloon, even if it was not due to failure to conduct the business lawfully, the lessor not having been responsible for the order, the lessee not being thereby entirely deprived of the beneficial use conferred by the lease, the specified lines of business not being identical or inseparable, a "restaurant" being an establishment where meals and refreshments are served, while a "saloon" is a place where intoxicating liquors are sold and consumed, and the lease making no provision for the contingency of inability to secure a saloon license.

URNER, J. In June, 1910, the appellee leased to the appellant a building in Baltimore by an agreement under seal which contained a covenant that the property should be used solely for the purposes of a saloon and restaurant, which should be conducted in an orderly manner and in compliance with all laws in force in the city relating to business of that nature. It was agreed that the leased premises should not be sublet without the lessor's written consent. The lease was for an original term of two years, beginning on the 1st day of August, 1910, but provision was made for its renewal for an equal period, at the option of the lessee, and for successive extensions of two years each thereafter in the absence of a notice to the contrary by either party prior to the expiration of a current term. The agreement called for rental payments of $100 monthly in advance. With the lessor's knowledge and acquiescence the premises were occupied and used for saloon and restaurant purposes by subtenants of the lessee from the beginning of the original term until about November 1, 1914; the lease having been twice renewed upon the same terms in accordance with its provisions to that end. During the whole of that period the rent was paid by the lessee, and he continued to make the stipulated monthly payments until April, 1915. This suit is for the recovery of rent accruing since that time. The defense, interposed by special pleas, is: That the board of liquor license commissioners for Baltimore City on or about the 1st day of November, 1914, refused to permit a saloon to be further conducted on the leased premises, and has since adhered to that determination.

In alleging that the board of liquor license commissioners had prohibited the further use of the rented property for saloon purposes, the pleas seek to interpose a defense which is incomplete and untenable. There are various considerations which unite in supporting this conclusion. In the first place, there is no suggestion that the lessor was in any way responsible for the passage of the prohibitory order. There is no allegation whatever as to the conditions which induced that action. If it was due to a possible default on the part of the lessee in the observance of the covenant that the business should be lawfully conducted, the lessor would certainly not be chargeable with the consequences of such a breach.

But if we assume, as doubtless we should in the absence of any averment or proof to the contrary, that the refusal of the liquor license commissioners to allow a saloon to be longer operated on the leased premises was not because of any neglect of contractual duty on the part of the lessee company, we nevertheless fail to find in that action a sufficient reason for declaring the lease terminated. The lessee has not been entirely deprived of the beneficial interest which the lease conferred. The saloon business was not the only use to which the property was agreed to be devoted. It was leased for the double purposes of a saloon and restaurant, and there is no prohibition against its continued use for the latter object. The specified lines of business were not identical or inseparable. A "restaurant" is an establishment where meals and refreshments are served; while a "saloon," as the term is here used, is a place where intoxicating liquors are sold and consumed. Webster's New International and Century Dictionaries. There being consequently a serviceable use for which the property is still available consistently with the limitations of the demise, the lessee company is not in a position to assert that it is totally deprived of the benefit of the tenancy.

It is further to be observed that, while the possibility of a failure to secure a license for the saloon on the rented premises during the whole of the original and renewal terms of the lease might have been reasonably anticipated, no provision is made in the agreement for such a contingency.

There are cases in which the considerations we have mentioned have been severally treated as of controlling importance in the decision

of questions analogous to the one now under discussion.

In a note to Taylor v. Finigan, 189 Mass. 568, 76 N. E. 203, as reported in 2 L. R. A. (N. S.) 973, the ruling there made that the enforcement by public officers of restrictions as to the use of leased premises does not amount to an eviction, suspending liability to pay rent, is said to be uniformly supported by other adjudications on the subject, following, "the basic principle that, to constitute a constructive eviction, the act complained of must have been done by the landlord or by his procurement, with the intention and effect of depriving the lessee of the use and enjoyment of the demised premises, in whole or in part." This was the theory of the decision in Miller v. McGuire, 18 R. I. 770, 30 Atl. 966, holding that a tenant was not constructively evicted because a license for the sale of intoxicating liquors on the leased premises could no longer be procured, by reason of the erection of a public school in that vicinity. In Lawrence v. White, 131 Ga. 840, 63 S. E. 631, 19 L. R. A. (N. S.) 966, 15 Ann. Cas. 1097, the same doctrine was applied to a case where the operation of a leased bar room had to be discontinued in consequence of the enactment of a prohibitory law. On the other hand, in Grabenhorst v. Nicodemus, 42 Md. 236, where property was rented for use as a distillery, and the lessor refused to give his written consent, as a legal prerequisite, to such user, it was held that the refusal of the lessor amounted to a constructive eviction.

In the case of O'Byrne v. Henley, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496, it was held that a lease of property solely for saloon purposes was not terminated by the taking effect during the term of a prohibitory liquor law, where, by construction of the parties, the right was conferred upon the lessee to sell upon the premises nonintoxicating beverages and tobacco, so that the lessee's user of the property was not totally destroyed. The case of Hecht v. Acme Coal Co., 19 Wyo. 18, 113 Pac. 788, 117 Pac. 132, 34 L. R. A. (N. S.) 773, 777, Ann. Cas. 1913 E, 258, is to the same effect.

There are other cases in which it has been held without qualification that the enforced discontinuance of a saloon business on leased premises, in consequence of a prohibitory law enacted subsequent to the lease, does not relieve the tenant of liability to pay rent, although the use of the property is restricted to that business by the terms of the lease. The main theory of such decisions is that, the sale of intoxicating liquors being subject to regulation or prohibition under the police power of the state, a lease of property for saloon purposses must be considered as being made subject to the exercise of that power, and if the tenant desires to protect himself against a change in the liquor laws, he should so stipulate in the agreement, and if he omits to provide for such a contingency, he is bound by the contract as executed. J. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co., 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498; Houston Ice & Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197.

The decision we render in the case now before us does not rest alone upon any one of the series of reasons we have referred to, nor upon the principle of the ruling in any of the individual cases cited, but upon the presence here in combination of all the considerations we have mentioned, which undoubtedly afford ample ground for the conclusion that the defense interposed was not sufficient, and that the demurrer to the plea was properly sustained.

Judgment affirmed, with costs.

NOTE.—*Constructive Eviction of Lessee by Statute Making Part of His Business Illegal.*—The ruling in the instant case, except as it may be differentiated by the fact of there being only a partial deprivation of use of the leased premises, seems opposed to the weight of authority.

Thus in Greil Bros. Co. v. Mabson, 179 Ala. 444, 60 So. 876, 43 L. R. A. (N. S.) where a barroom and fixtures were rented "for occupation and use as a bar and not otherwise," it was said: "'Bar' and 'barroom' seem to have a more restrictive meaning than 'saloon' and by the great weight of authority mean a place from which intoxicating liquors are to be sold. * * * It is therefore evident that the main, and, indeed, the sole, purpose for which the property was leased was that it should be used as a place for selling intoxicating liquors. Therefore, did the said business become totally prohibited by the subsequently enacted state prohibition law? We think that such was the result, and that the said prohibition law forbade the very business and purpose for which the property was leased." It therefore came under the rule of performance, depending on the continued existence of that which was the basis of the agreement.

So in Heart v. East Tenn. Brewing Co., 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753, where the lease was for a house and lot "to be used as a saloon or place for the sale of intoxicating liquors." The court said: "It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors. It was the purpose of both lessor and lessee, as clearly expressed in the instrument, that it should be used

as a saloon, and, this being made unlawful by law, the contract is no longer enforceable." In the Mabson case the lease said, "and not otherwise." This case takes the purpose of the leasing as impliedly restricting the use, a restriction in favor of lessor, because it is in the making of his covenant for quiet enjoyment. The law makes his covenant incapable of being further performed. It is his promise that is broken by the law, and he can supply no consideration for lessee's reliance thereon.

As showing the lease must relate solely to carrying on the business which the law afterwards prohibits, Hecht v. Acme Coal Co., 19 Wyo. 18, 113 Pac. 788, 117 id. 132, 34 L. R. A. (N. S.) 773, Ann. Cas. 1913 E, 258, is directly in point. The lease was for saloon purposes, but the court said: "We think it quite clear that both the lessors and the lessee contemplated that the business should include the sale of soft drinks and cigars as well as intoxicating liquors. The facts in this case are almost identical with those in O'Byrne v. Henley, 161 Ala. 620, 50 So. 83, 23 L. R. A. (N. S.) 496." It was held in both of these cases that the subsequent law "did not terminate the lease and relieve the lessee from liability for future rent, for the reason that the business was not totally destroyed."

Re Bradley, 225 Fed. 307, cited considerable authority from Alabama, by the rulings of whose courts the District Judge felt himself bound because the question was a local one. It was held, however, that though the lease provided the premises were to be used as a saloon and for no other purpose, yet there was a distinction between a barroom and a saloon, and it was shown that the tenant used the premises for the sale of non-intoxicating drinks and cigars and tobacco. As there was no contract stipulating for any remission of rent, it was held that Alabama law was to be enforced and this only recognized constructive eviction, where there was total destruction of the business by subsequent legislation.

Even in states where the rule is recognized, that subsequent legislation prohibiting the business for the conducting of which a lease is entered into exempts lessee from further liability, if there is total destruction of the business, the principle is refused application in favor of one not able to procure renewal of his license as a saloonkeeper. Burke v. San Francisco Breweries, Cal. App., 131 Pac. 83. It was said: "No provision was made by the parties to the lease for its termination in the event of the failure of the defendant to secure a renewal of its license. * * * The renewal of defendant's license * * * was a privilege which could be granted or withheld only by the municipality." Defendant was said to have assumed the risk that renewal of license would be refused. In support of this ruling there are cited Burgett v. Loeb, 43 Ind. App. 657, 88 N. E. 346; Houston Ice & B. Co. v. Keenan, 99 Tex. 79, 88 S. W. 368; White v. Stuart, 76 Va. 546.

It appears, then, that to defend, in the absence of stipulation expressly covering what may result from change of law, destruction of the business solely contemplated will absolve a lessee from obligation and it is not application of law to a particular tenant that it will have such effect. C.

HUMOR OF THE LAW.

At a banquet of notables, an aspiring young attorney spied an influential judge at the head of the table and slipped a half-dollar into a waiter's hand, whispering:

"Put me next to Judge Spink."

However, he found himself seated many politicians below. He called the waiter to explain.

"Fact is," said that individual, "the judge gave me a dollar to seat you way down here." —*Brooklyn Citizen.*

"I'm surprised to see you drinking coffee, Judge," remarked a friend. "Don't you know that coffee is very heating during weather like this?"

"Yes," admitted the judge. "At least, I have heard so."

"In hot weather you ought to drink iced beverages," advised the friend. "Did you ever try gin rickeys and"—

"No," smilingly interposed the coffee drinker, "but I have often tried men who have."

"Where is your lawyer?" inquired the judge.

"I have none," responded the prisoner; "haven't any money."

"Do you want a lawyer?" asked the judge.

"Yes, your Honor."

"There is Mr. Smith, Mr. Brown and Mr. Green," said the judge, pointing to the young attorneys waiting, briefless and breathless, for something to turn up, "and Mr. Alexander is out in the corridor."

The prisoner eyed the budding attorneys and after a critical survey said, "Well, I guess I'll take Mr. Alexander."—*Tit-Bits.*

In one of the western counties of Kansas, a colored man charged with violation of the prohibitory liquor law, under the advice of his attorney, had decided to plead guilty to the offense.

"What have you to say with reference to the charge brought against you?" asked the judge.

"Wall, Jedge," and he scratched his head as he waited before speaking further—"wall, Jedge, I don't know as it makes much difference what I got to say, it's what you got to say, Jedge."

WEEKLY DIGEST

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1. **Adverse Possession**—Evidence. — An admission by possessor of land that his possession was held in subordination to the real title, if made during period relied upon, should be given conclusive effect, but, if subsequent to such period, is to be considered with other evidence in determining whether possession was adverse.—Nerio v. Christen, Tex., 189 S. W. 1038.

2. **Agriculture**—Statutory Construction.—The "primary" plan of the Farm Loan Act is not invalid as failing to provide for the working details thereof, since whatever authority is necessary to execute the power given is conferred by implication.—State v. Stewart, Mont., 161 Pac. 309.

3. **Attorney and Client**—Misconduct. — The writing of letters injuring a business man's credit, although unwarranted, held only censurable, in view of attorney's youth and short experience as lawyer.—In re Barondess, N. Y., 162 N. Y. Supp. 114.

4.——Practicing Law.—Under Pen. Code, § 270, prohibiting practice by one not an attorney, agreement between property owners and one not an attorney that latter should endeavor to secure reduction of assessment held illegal, and retainer of counsel by latter in certiorari proceedings unlawful.—People ex rel. Holzman v. Purdy, N. Y., 162 N. Y. Supp. 65.

5. **Bankruptcy**—Custodia Legis.—An adjudication in bankruptcy places all property of bankrupt in custodia legis, and although under state laws creditors of bankrupt in his capacity as a private banker have priority in assets devoted to that business, court of bankruptcy had jurisdiction to distribute such assets.—State of Missouri v. Angle, U. S. C. C. A., 236 Fed. 644.

6.——Mortgagee.—Where, in bankruptcy proceedings, land is sold subject to mortgage, the mortgagee, who did not prove his claim, may, as any other person, bid for the owner's equity of redemption.—In re Old Oregon Mfg. Co., U. S. D. C., 236 Fed. 804.

7.——Preference.—A mortgage given within four months preceding the bankruptcy of the mortgagor to secure future advances is not a preference.—Dunlap v. Seattle Nat. Bank, Wash., 161 Pac. 364.

8.——Title of Trustee.—The trustee in bankruptcy takes only such title and interest in the property as the bankrupt has at the time of filing the petition, and so took title to the homestead, possession of which had been decreed to the wife on divorce subject to her rights.—Brown v. Brown, Ky., 189 S. W. 921.

9. **Banks and Banking**—Insolvency.—A bank is not "insolvent" if its assets are sufficient to meet its obligations within a reasonable time, although it did not have cash sufficient for its daily needs.—Dunlap v. Seattle Nat. Bank, Wash., 161 Pac. 364.

10.——Unpaid Subscription.—To enforce unpaid subscriptions of stockholders of an insolvent bank, an accounting of the assets and debts and of the amount of capital remaining unpaid, and assessment of the amount due from each stockholder, is a condition precedent.—Sargent v. Waterbury, Ore., 161 Pac. 443.

11. **Bills and Notes**—Assignment. — Where note was transferred by holder by written assignment to chattel mortgagees to secure note to them, mortgagees were vested with title to note as well as to mortgage intended to secure it, a right which could not be defeated by holder's subsequent acquisition of note and delivery of it to maker without mortgagees' consent.—T. W. Marse & Co. v. Flockinger, Tex., 189 S. W. 1017.

12.——Demurrer.—In suit on note given for purchase price of land, plea setting up that after sale plaintiff discovered that her minor children had interests in land and that she agreed to accept from defendant notes payable to the minors, amounts of which were to be deducted from note in suit, held good as against demurrer.—Hyde v. Bozeman, Ga., 90 S. E. 863.

13.——Presentation and Demand.—Maker of demand note waived its actual presentation upon a demand for payment by not asking for it, and by refusing payment on ground that he did not then have the money, and that he needed the amount to support his family.—Hodges v. Blaylock, Ore., 161 Pac. 396.

14.——Reservation of Title.—A note, reciting that it was given for the purchase of a threshing machine, to which title was reserved in the payee, with right to declare forfeiture at any time for nonpayment, even before the due date, is nonnegotiable.—Western Farquhar Machinery Co. v. Burnett, Ore., 161 Pac. 384.

15.——Variance.—In a suit on a note, in which petition alleged that note was executed January 1, 1911, and matured November 1, 1911, and the note offered in evidence is dated January 1,

"19011," and matures November 1, "19011," being manifestly a clerical error, held there was no such variance as would surprise and note was properly admitted in evidence.—Braxton v. Voyles, Tex., 189 S. W. 965.

16. **Carriers of Goods**—Car Shortage.—In interstate shipper's action for carrier's failure on demand to supply sufficient cars to transport output of coal mine, evidence of number of carrier's coal cars on other railway lines held immaterial; there being no claim of a car shortage or abnormal conditions.—Pennsylvania R. Co. v. Sonman Shaft Coal Co., U. S. S. C., 37 Sup. Ct. 46.

17.——Initial Carrier.—Where interstate shipment was transferred on direction of consignee at destination named in bill of lading and shipped to another point on the same bill of lading, the issuing carrier was the initial carrier within the Carmack Amendment to the Interstate Commerce Act, and liable for damages to shipment.—Baltimore & O. R. Co. v. Montgomery & Co., Ga., 90 S. E. 740.

18.——Initial Carrier.—Defendant having issued through bill of lading for interstate shipment from a point at which goods had been delivered to plaintiff by another carrier, held the initial carrier within Carmack Amendment.—Victor Produce Co. v. Western Transit Co., Minn., 160 N. W. 248.

19.——Rates.—The fact that complex computation is necessary to determine portion of coal used to generate electricity furnished to manufacturers entitled to lower rate on coal does not make unreasonable an order requiring the railroads to carry such portion of its coal to an electric company.—Vandalia R. Co. v. Public Service Commission, Ind., 114 N. E. 412.

20. **Carriers of Live Stock**—Stipulation.—The failure to comply with "uniform live stock contract," under which interstate shipment was made, as to presentation of claim for damages and verification thereof, held to defeat recovery for injury to shipment, in absence of circumstances rendering the stipulation invalid or excusing noncompliance.—Chesapeake & O. R. Co. v. McLaughlin, U. S. S. C., 37 Sup. Ct. 40.

21.——Variance.—There is a fatal variance between a petition alleging injury to cattle jointly owned by the plaintiffs and praying for a joint recovery and proof of a separate cause of action in favor of each plaintiff.—International & G. N. Ry. Co. v. Reed, Tex., 189 S. W. 997.

22. **Carriers of Passengers** — Contributory Negligence.—Deceased who, the vestibule having been opened by the brakeman, went upon the steps of the moving train and because of his position was thrown off or fell off, held negligent as a matter of law.—Murray v. Southern Pac. Co., U. S. C. C. A., 236 Fed. 704.

23.——Ejection.—A railroad is liable to one who boarded its train in good faith believing an order for a ticket was a ticket for her ejection without a demand for payment of the fare.—Jones v. Mobile & O. R. Co., Miss., 72 So. 1009.

24.——Limitation of Liability.—Acceptance and use by interstate passenger of ticket purporting to limit baggage liability, unless greater value should be declared and excess charges paid, establish a limitation prima facie valid.—New York Cent. & H. R. R. Co. v. Beaham, U. S. S. C., 37 Sup. Ct. 43.

25.——Loss of Baggage.—The rights and liabilities of an interstate passenger and the carrier in case of a loss of baggage depend upon federal legislation, the agreement between the parties, and common-law principles, as accepted and enforced in federal tribunals.—New York Cent. & H. R. R. Co. v. Beaham, U. S. S. C., 37 Sup. Ct. 43.

26. **Commerce**—Employe.—A telegraph operator, who occasionally received messages relating to movement of interstate trains, and arranged for the passing of defendant's trains with interstate trains of a second railway company, whose tracks defendant used, held engaged in interstate commerce, within the Hours of Service Act.—Denver & I. Ry. Co. v. United States, U. S. C. C. A., 236 Fed. 685.

27.——Interstate Shipment.—The sale and delivery of coal f. o. b. cars at the mine for transportation to purchasers in other states is interstate commerce.—Pennsylvania R. Co. v. Sonman Shaft Coal Co., U. S. S. C., 37 Sup. Ct. 46.

28.——Preference in Rates.—Where telegraph company leased wires to press agency, and thereafter made similar contracts with other news agencies for wire service at less rates between different points, there was a preference to a locality, in violation of Interstate Commerce Act, § 1, as amended by Act Conf. June 29, 1906, § 1, and section 3.—Postal Telegraph-Cable Co. v. Associated Press, N. Y., 162 N. Y. Supp. 4.

29.——Rates.—Interstate Commerce Commission, in permitting charging of lesser rate on west bound freight to certain ports of call than to certain interior coast cities, held not to have violated Act Feb. 4, 1887, § 4, as amended by Act June 18, 1910, § 8, as to permitting increase of rates previously reduced because of competition with water routes.—United States v. Merchants' & Manufacturers' Traffic Ass'n of Sacramento, U. S. S. C., 37 Sup. Ct. 24.

30. **Compromise and Settlement**—Instructions.—Where defendant agreed in writing to pay a certain sum in consideration of having spoken words claimed by plaintiff to be slanderous, and such words were not slanderous per se, and plaintiff did not claim or prove special damages, there was not sufficient proof of consideration to warrant peremptory instruction for plaintiff in action thereon.—Deiss v. Kasselmann, Mo., 189 S. W. 824.

31. **Conspiracy**—Bankruptcy.—An indictment charging that defendants, expecting an involuntary petition in bankruptcy against one of them and appointment of a receiver, conspired to conceal property of the expected bankrupt, and setting forth overt acts done, is sufficient, though not alleging that owner was a bankrupt at the time of conspiracy.—Friedman v. United States, U. S. C. C. A., 236 Fed. 816.

32. **Constitutional Law**—Due Process of Law.—A nonresident vendee's rights were not foreclosed without due process of law, for lack of actual notice of cancellation proceedings, where in fact his rights were not foreclosed by the cancellation proceedings, but by decree quieting title in vendor in a suit in which the vendee appeared, and in which the court found a default under the law of the situs, which it held controlling.—Kryger v. Wilson, U. S. S. C., 37 Sup. Ct. 34.

33.——Nonresidents.—Absence from New Jersey automobile law of provision for temporary use of highways by nonresidents in return for

similar privileges granted to residents of New Jersey does not involve unconstitutional discrimination against nonresidents; the prescribed fees being reasonable, and resident owners being subjected to full charge for use of highways for any period however brief.—Kane v. State of New Jersey, U. S. S. C., 37 Sup. Ct. 30.

34.——Physicians and Surgeons.—Defendant having applied for and received a certificate to practice osteopathy, upon being prosecuted for practicing medicine and surgery without a certificate, cannot complain of the unconstitutionality of the provisions of the statute, restricting the right to secure a certificate to practice medicine and surgery, where such restriction does not invalidate the entire act.—State v. Bonham, Wash., 161 Pac. 377.

35.——Police Power.—State statutes, prohibiting sale as "ice cream" of product containing less than fixed percentage of butter fat, do not deny the equal protection of the laws; percentages fixed not being unreasonable, though ice cream of commerce may under some formulas be made without either cream or milk.—Hutchinson Ice Cream Co. v. State of Iowa, U. S. S. C., 37 Sup. Ct. 28.

36. **Contracts**—Illegality.—Illegality of performance due to change in law renders ineffectual agreements which, though originally consistent with law, are prohibited by the change.—Bunch v. Short, W. Va., 90 S. E. 810.

37.——Performance.—Where professional boxer contracted to box ten rounds under certain rules, and by his own act struck a foul blow, making substantial performance impossible, held that he could not recover under his contract.—Moha v. Hudson Boxing Club, Wis., 160 N. W. 266.

38.——Third Person.—A father's agreement with his son to deed land to a daughter held within the rule that, when a person for a consideration agrees to pay money to a third person, a stranger to the transaction, the latter becomes possessed of an absolute right thereto.—Sedgwick v. Blanchard, Wis., 160 N. W. 267.

39.——Waiver.—Under a contract for installation of fire prevention machinery containing no provision as to time of completion, the purchaser waived the oral promise of the installer's agent to complete within three weeks, where he permitted the work to be commenced six weeks after signing the contract and made a payment on the price nearly three months thereafter.—Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co., Cal., 161 Pac. 266.

40. **Corporations**—Cancellation for Fraud.—A suit to cancel for fraud a deed executed by directors of a corporation held properly brought in name of a stockholder owning practically all stock; the corporation being a defendant.—Hughes Mfg. & Lumber Co. v. Culver, Ark., 189 S. W. 850.

41.——Fraud.—Purchasers of the stock of a corporation which had been issued in exchange for the contract rights to manufacture a novel water pump cannot cancel their purchase for fraud, where they invested because they believed in the practicability of the machine.—Shaw v. Carr, Wash., 161 Pac. 345.

42.——Laches.—Where owner of capital stock of gas company who agreed in a contract of sale to make certain improvements, did not promptly complete improvements, and did not demand payment as soon as they were completed, but purchaser was in no way prejudiced, owner cannot be held guilty of laches, precluding recovery.—Moloney v. Cressler, U. S. C. C. A., 236 Fed. 636.

43.——Libel and Slander.—A publishing corporation is liable for malicious libelous publications without proof of express malice, where the publication is made by its authority or ratified by it, or made by agent in the course of the business.—Stair v. Journal & Tribune Co., Tenn., 189 S. W. 864.

44.——Minority Stockholder.—Where it appeared that a major stockholder acquiesced in the making of improper charges against the corporation by another corporation which he also controlled, held, that a minority stockholder could bring suit in behalf of himself and other stockholders without first making demand upon the corporation and its officers and directors for redress.—Merle v. Beifeld, Ill., 114 N. E. 369.

45.——Overvaluation.—Where corporate stock was paid for in property, and it was contended that creditor, who once owned part of stock, was liable because stock had not been fully paid for, property contributed having been overvalued, it is inequitable to charge against such stock more of deficiency than ratio it bears to whole stock.—Durand v. Brown, U. S. C. C. A., 236 Fed. 609.

46.——Purchaser of Stock.—Under contract for purchase of stock with an agreement that if purchaser did not want it, seller would take it off his hands upon 30 days' written notice of purchaser's intention, purchaser's action on contract to repurchase was not a case of attempted repudiation or rescission, but a mere adoption of a right expressly given by contract.—Doughty v. Law, Ia., 160 N. W. 226.

47.——Slander.—A corporation is not liable, without proof of malice, for slander spoken by one servant to another, acting within the scope of his authority and in the interest of the master, but not actually authorized to speak the slanderous words.—Southern Ice Co. v. Black, Tenn., 189 S. W. 861.

48. **Divorce**—Publication Service.—Although the affidavit of the proprietor of a newspaper in which warning order in divorce action was published showed an insufficient publication, this did not invalidate the decree since, under Kirby's Dig. § 4924, as to such publication, such record is merely incomplete.—Allen v. Allen, Ark., 189 S. W. 841.

49. **Electricity**—Confiscatory Rates.—In determining whether an ordinance fixing rates to be charged by an electric company is confiscatory, the capital on which the company is entitled to earn a fair return is the reasonable value at the time of the property being used in the service.—Garden City v. Garden City Telephone, Light & Mfg. Co., U. S. C. C. A., 236 Fed. 693.

50.——Employers' Liability Law.—An electric company can exercise control over a switch between its wire and a pump owned by an individual, even if it does not own the switch, and is liable for its defective condition, under the Employers' Liability Law.—Clayton v. Enterprise Electric Co., Ore., 161 Pac. 411.

51. **Embezzlement**—Evidence. — That patron told driver of hack that he had given him a $2 bill by mistake for a $1 bill was immaterial, as defendant, so far as criminal law as to embezzlement was concerned, was under no duty to accept patron's unsupported statement and pay him money claimed on faith of it.—Roan v. City of Hattiesburg, Miss., 72 So. 1005.

52. **Estoppel**—Evidence.—If an officer of a bank who had purchased a note from the bank was present when payment was made to the bank and did not disclose his ownership, he is estopped from suing on the note.—Sivley v. Williamson, Miss., 72 So. 1008.

53. **Explosives** — Negligence. — Defendant held liable to an ultimate purchaser of dyna-

mite caps, injured when the caps exploded from sun's heat, where it knew or reasonably might have known that they were liable to so explode, and negligently failed to warn purchaser.—E. I. Dupont De Nemours Powder Co. v. Duboise, U. S. C. C. A., 236 Fed. 690.

54. **Factors**—Commissions.—Commission merchant, which contracted to market fruit for another without being authorized to employ subagents, could not charge principal with commissions paid such agents, and had to refund such commissions, though larger than commissions it received.—Sherwood Bros. v. Seattle Fruit & Produce Auction Co., Wash., 161 Pac. 371.

55. **Gifts**—Executor.—Where deceased, being of unsound mind, delivered money to another, who at his request bought exchange in own name and indorsed it to county treasurer for credit of school district, without knowledge that transaction was not what it purported to be, a gift from indorser, held that executor of deceased could not recover money.—Trice v. School Dist. No. 40, Ark., 189 S. W. 846.

56. **Guaranty**—Cessation of.—Under a guaranty of credit for "E. E. Peoples Company, Memphis, Texas, and Clovis, N. M.," unconditionally guaranteeing whatever amount said party should owe, the grantor was not liable after the party guaranteed gave up business at those places and engaged in business elsewhere in Texas.—Friedman-Shelby Shoe Co. v. Davidson, Tex., 189 S. W. 1029.

57. **Husband and Wife**—Counterclaim. — In wife's action on husband's note secured by mortgage on their home place, where she paid taxes and premiums on husband's life policy while he was insane, his counterclaim for rents collected by her while he was in a hospital, was properly disallowed.—Dalton v. Dalton, Ky., 189 S. W. 902.

58. **Insane Persons**—Liability for Necessaries. —A husband confined in hospital for insane, was still liable for necessaries of wife to same extent as before, and recovery might be had against his estate for reasonable value of supplies furnished her during his lunacy.—Dalton v. Dalton, Ky., 189 S. W. 902.

59. **Insurance** — Abandonment. — A vessel, waterlogged and abandoned by her crew at sea, held not an actual total loss, where the hull and parts of equipment and apparel were saved and brought into port by salvors in a condition capable of being repaired at some cost.—Fireman's Fund Ins. Co. v. Globe Nav. Co., U. S. C. C. A., 236 Fed. 618.

60.——Accident.—Positive statements, in death certificate, that cause of death was arteriosclerosis, controlled inferences from insured's fall, injury, and death, and made it impossible for jury to find that insurer's directors, whose decision was binding, should have decided death was due wholly to accident.—Page v. Commercial Travelers' Eastern Acc. Ass'n, Mass., 114 N. E. 430.

61.——Misrepresentation.—Where the soliciting agent represented that the annual premium would be a certain sum, whereas the by-laws, by reference incorporated in the policy, provided for assessments, the fact that the representation was oral and preceded delivery of the policy which was accepted without objection, is of no serious consequence.—Illinois Bankers' Life Ass'n v. Dodson, Tex., 189 S. W. 992.

62.——Principal and Agent.—An insurance agent, having apparent authority to transact the business intrusted to his care and no restriction on his authority being brought home to the applicant, can orally contract for the company to renew a policy.—National Live Stock Ins. Co. v. Cramer, Ind., 114 N. E. 427.

63. **Intoxicating Liquors**—Intent.—Under P. S. § 5204, making it an offense to keep intoxicants with intent to furnish or sell without first procuring license, complaint alleging that defendant kept liquor with intent to sell "without authority so to do" held sufficient.—State v. Monti, Vt., 99 Atl. 264.

64. **Landlord and Tenant**—Contract.—Where contract between an amusement corporation and a concessionaire granted exclusive rights and privileges for sale of certain commodities in park, but provided that the "exact space" will be shown and designated on general ground plans, exercise of rights and privileges granted held limited to space mentioned.—Merle v. Beifeld, Ill., 114 N. E. 369.

65.——Conversion. — Where part of crop, raised on rented premises, belonging to landlord, or on which he has landlord's lien, is purchased without his consent or authority within 30 days of removal, there is conversion, for which purchaser is liable to extent of value of crop converted, or less, if rent due is less.—Farmers' Elevator Co. v. Advance Thresher Co., Tex., 189 S. W. 1018.

66.——Rescission.—Where vendors had waived delay in payments on a land sale contract, and the vendee under mistake of law that his rights had been lost by delay consented to take a seven-year lease instead of a conveyance, for the original consideration named in the contract, the vendee was entitled to rescind the contract of lease under Civ. Code, § 1689.—Butte Creek Consol. Dredging Co. v. Olney, Cal., 161 Pac. 260.

67. **Libel and Slander**—Action.—A newspaper publication, stating that plaintiff had slapped a boy and girl and had been sentenced to the workhouse therefor, was actionable per se.—Stair v. Journal & Tribune Co., Tenn., 189 S. W. 864.

68. **Master and Servant**—Accident. — Night watchman, who, while making his rounds through a mill, was killed and robbed by an employe of the mill, who had no intent to rob the mill or destroy its property, was not killed by an accident arising out of his employment. —Walther v. American Paper Co., N. J., 99 Atl. 263.

69.——Evidence.—A railroad company is not liable for injuries received by an employe, who was struck by the top of a switch stand, where physical facts showed that he must have been in an unusual position, and switch was of usual approved pattern, not unsuited to particular locality.—Davies v. Chicago, M. & St. P. Ry. Co., U. S. C. C. A., 236 Fed. 728.

70.——Independent Contractor.—Where in the construction of a railroad a workman was injured by the negligent use of explosives, the railroad was not protected from liability by his employment by independent contractor.—Black Mountain R. Co. v. Ocean Accident & Guarantee Corp., N. C., 90 S. E. 763.

71.——Res Ipsa Loquitur.—The doctrine of res ipsa loquitur, to extent of its reason, is applicable to case where a master in a separate department to which servant has no access permits a deadly current to pass along wires upon which he is working.—Myers v. City of Independence, Mo., 189 S. W. 816.

72.——Safe Place.—In a plaintiff servant's action for injuries sustained in falling into a poisonous vat, although reeling machine, which stuck, was not defective, defendants would not be relieved from responsibility if negligent in providing plaintiff a reasonably safe place to work, and that negligence caused the accident. —Osman v. W. H. McElwain Co., N. H., 99 Atl. 287.

73.——Statutory Construction.—A stenographer and bookkeeper is a "worker" within the meaning of the Employment Agency Act.—State v. Rossman, Wash., 161 Pac. 349.

74.——Workmen's Compensation Act.—Workmen's Compensation Act, § 21, held not to create presumption to support a finding of Industrial Commission that claimant had lost use of hand, where there was no evidence in record to support finding.—Kanzar v. Acorn Mfg. Co., N. Y., 114 N. E. 398, 219 N. Y. 326.

75.——Workmen's Compensation Act.—Under Workmen's Compensation Law, § 29, and in view of sections 95 and 97, insurance carrier, as assignee of cause of action of widow of deceased, killed by electric current in defendant's primary wires, held entitled to recover full liability of defendant, and not confined to payments actually made to widow.—Casualty Co. of America v. A. L. Swett Electric Light & Power Co., N. Y., 162 N. Y. Supp. 107.

76.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 14, excluding employes engaged in horticultural labor, janitor of dancing hall and house, injured by stepping on palm thorn while pruning fig tree, held not entitled to compensation.—Kramer v. Industrial Acc. Commission of State of California, Cal., 161 Pac. 278.

77.——Workmen's Compensation Act.—Under Workmen's Compensation Insurance and Safety Act, §§ 13, 14, defining employer and employe, one regularly employed as driver for contract teamster and directed to haul lumber for third party, using his employer's horse and third party's wagon, when fatal accident occurred, was an employe of his regular employer.—Kirkpatrick v. Industrial Accident Commission of California, Cal., 161 Pac. 274.

78. **Mortgages**—Intent.—Where after deeds were executed, grantee made a written declaration of a naked trust for the benefit of grantor and his heirs, it must be assumed that such was the intention of parties, and an intention to create a mortgage cannot be presumed.—Welsh, Driscoll & Buck v. Buck, Utah, 161 Pac. 455.

79. **Municipal Corporations** — Estoppel. — Where owners abutting on street knew it was being paved, curbed and guttered, and that cost was to be assessed against their land, they were estopped to deny sufficiency of notice directing them to cause the paving, etc.—Catts v. Town of Smyrna, Del., 99 Atl. 281.

80. **Nuisance**—Damages.—In determining permanent character of injury to real estate, test is whether whole injury originates from wrongful act or from wrongful continuance, and such test should be applied in determining damages from maintenance of sewer, emptying into stream running through owner's property.—City of Ada v. Melberg, Minn., 160 N. W. 257.

81. **Payment**—Ratification.—Where the purchaser of fire prevention machinery mailed a check which was credited on account, but claimed that it was sent through error, and later, by a statement of account, itemized such check as a payment on account, it ratified the payment. —Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co., Cal., 161 Pac. 266.

82. **Physicians and Surgeons**—License.—Laws 1911, c. 93, prohibiting practicing medicine without a license, does not concern systems of treatments, but merely prohibits anyone from treating diseases who has not the requisite qualifications.—State Board of Medical Examiners v. Terrill, Utah, 161 Pac. 451.

83. **Principal and Agent**—Modifying Instructions.—The buyer of growing timber who directs the bank in which the proceeds from sales thereof were deposited to pay the stumpage reserved to the landowner, can modify such instructions either by act or direction.—Vance Lumber Co. v. United States Trust Co., Wash., 161 Pac. 341.

84.——Scope of Agency.—Where defendant, in negotiating for purchase of capital stock of gas company, induced superintendent in charge to make written misrepresentations as to its condition to assist him in securing financial backing for project, and owner did not know of such misrepresentations, he is not bound thereby, and they cannot be considered in determining his liability on contract.—Moloney v. Cressler, U. S. C. C. A., 236 Fed. 636.

85. **Railroads**—Accident at Crossing.—Where the view was so obstructed that when deceased was crossing the track in a wagon his horses were on the track at the time he could first have seen the engine, and the train approached the crossing without sounding a bell or whistle at a high rate of speed, held deceased was free from contributory negligence as a matter of law, since looking or listening would not have saved him.—Hamilton v. Erie R. Co., N. Y., 114 N. E. 399, 219 N. Y. 343.

86.——Proximate Cause.—An automobile owner, approaching a railroad crossing at a speed unlawful under Laws 1913, c. 107, is not barred, as a matter of law, from recovery for damages to automobile in avoiding collision, unless such violation is the proximate cause of the injury.—Hinton v. Southern Ry. Co., N. C. 90 S. E. 756.

87.——Signals.—Where a fast train, not sounding its bell or whistle, collided with decedent in a wagon on a misty morning before the sun had risen, the crossing being unprotected except for an automatic signal bell which was out of order, the railroad company was negligent.—Hamilton v. Erie R. Co., N. Y., 114 N. E. 399, 219 N. Y. 343.

88. **Release**—Joint Tortfeasor.—Acceptance of money in satisfaction of claim against joint tortfeasor, even with reservation that it is not to be considered as release of another, releases the latter.—Randall v. Gerrick, Wash., 161 Pac. 357.

89. **Sales**—Subject to Approval.—Where order for machinery was subject to plaintiff's approval, defendant might before approval orally agree with plaintiff's agent to accept only part of the machinery; the agent having authority to make modification.—International Harvester Co. of America v. Swenson, Minn., 160 N. W. 255.

90.——Warranty.—The purchaser of a warranted plow, under false and fraudulent representations, who rescinded, could not, unless the seller was insolvent, have a lien on the plow for the amount of any damages decreed him.—Hackney Mfg. Co. v. Celum, Tex., 189 S. W. 988.

91. **Specific Performance**—Subject-Matter.—Contract for sale of entire capital stock of gas company, which property was not to be obtained on open market, is one which may be specifically performed.—Moloney v. Cressler, U. S. C. C. A., 236 Fed. 636.

92.——Undisclosed Principal.—Despite Gen. St. 1913, § 7003, an undisclosed principal may enforce specific performance of a contract to sell land made by his agent in the agent's name, though the agent was not authorized in writing to effect the sale.—Unruh v. Roemer, Minn., 160 N. W. 251.

93. **Telegraphs and Telephones**—Connection with Residence.—Where the addressee of a message in his action for failure to deliver alleged a contract to deliver at a named town, but failed to allege a contract to deliver by phone to a residence, it was immaterial that there was a phone connection from such town to such residence.—Western Union Telegraph Co. v. Fabian, Tex., 189 S. W. 1008.

94. **Theaters and Shows**—Res Ipsa Loquitur. —Operator of scenic railway whose cars and tracks were not defective, or operated other than was natural under force of gravity, could not be shown negligent under doctrine res ipsa loquitur as to passenger whose foot was injured by striking posts, rails, etc.—Painter v. Mountain Ry. Const. Co., Mo., 189 S. W. 805.

95. **Trusts**—Wills.—Where realty was conveyed without consideration upon faith of performance of a condition that grantee would devise it to grantor if living, and, if not, to his children, if he left any, grantee took property impressed with a trust to devise it or in some other way provide for performance of condition.—Androscoggin County Sav. Bank v. Tracy, Me., 99 Atl. 257.

96. **Vendor and Purchaser**—Bonus.—It was not error to fix the damages for partial failure of vendor's title at a price per acre based on the sum actually paid the vendor for all the land, although such sum included a sum claimed by vendor to have been intended merely as a "bonus" for the right to purchase.—Butte Creek Consol. Dredging Co. v. Olney, Cal., 161 Pac. 260.

97.——Rescission.—Where one purchasing land with opportunity to examine it voluntarily relies on statements of vendor, contract will not be rescinded or price abated unless there has been fraud or artifices to prevent examination.—Tallent v. Crim, Ga., 90 S. E. 742.

98. **Wills**—Construction.—Where various interpretations of a will are equally doubtful, that one will be preferred which approximates closest to the statutory order of distribution.—Ellsworth College v. Carleton, Ia., 160 N. W. 222.

99.——Defeasible Interest.—Under will devising land to four daughters defeasible upon their death without issue, the death of one of the three, who had acquired the interest of the fourth, vested a one-third interest in her share in a surviving sister in fee simple absolute.—Armstrong v. Thomas, Miss., 72 So. 1006.

100.——Homestead.—In view of Code Civ. Proc. §§ 1465-1468, as to setting aside property, etc., a will reading, "To my * * * wife * * * I bequeath and devise" a certain sum, and continuing, in another sentence, "This in addition to" the homestead, describing it, "to which she shall be entitled and which I hereby request the court to set apart to her," did not devise to the wife the fee of the homestead, which was deceased's separate property.—In re Krieg's Estate, Cal., 161 Pac. 257.